In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-646

JAMES D. OREE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The court of appeals wrote no opinion. The opinion of the district court (Pet. App. B) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 1972 (Pet. App. A). The petition for a writ of certiorari was filed on October 26, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court properly denied a motion for a new trial on the ground of newly discovered evidence.

STATEMENT

In 1970, following a jury trial in the United States District Court for the Southern District of New York, petitioner and three codefendants were convicted of narcotics offenses and petitioner was sentenced to ten years' imprisonment. On January 4, 1971, the court of appeals affirmed (*United States* v. *Bellamy, et al.*, 436 F. 2d 542 (C.A. 2)), and on April 26, 1971, this Court denied certiorari (402 U.S. 929). On January 29, 1971, a week prior to the filing of the original certiorari petition, petitioner filed in the district court a motion under 28 U.S.C. 2255 to vacate his conviction or in the alternative for a new trial on the ground of newly discovered evidence (hereafter referred to as the motion for a new trial) alleging that he had discovered after the trial that Dennis Copeman, a codefendant who had pleaded guilty and testified for the government, had made a pre-trial statement exonerating him of guilt (R. 1).[1] The district court denied the motion (Pet. App. B; R. 6) and the court of appeals affirmed (Pet. App. A).

1. The evidence at trial[2] showed that in August 1967 petitioner asked Copeman to run a "mill" for the packaging and distribution of heroin. On several occasions during the next few months Copeman conducted such an operation for petitioner. On November 29, 1967, petitioner told Copeman that another shipment of heroin had arrived and directed him to go

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[1] "R." refers to the numbered documents in the certified record on file in the Clerk's office.

[2] See 436 F. 2d at 544; government's Brief in Opposition, No. 1307, O.T. 1970, pp. 2-5.

that evening to apartment 3G at a designated address to package it. At 2 p.m. that day, narcotics agents saw petitioner enter apartment 3G with a plaid suitcase and depart shortly afterward without it. Later the agents saw codefendant James Hunter and several other persons enter the apartment. At 5:30 p.m., Copeman entered the apartment and supervised the packaging of the heroin after seeing another defendant remove it from a plaid suitcase. At 8 p.m., petitioner returned to the apartment and directed Copeman to give Hunter twenty-five bundles of the packaged heroin, which Copeman did, delivering the bundles to Hunter in a brown paper bag. Petitioner and Hunter then left together. As the two were leaving the building, petitioner, who was then carrying the bag, looked in the direction of the agents, stiffened, and shoved the bag to Hunter. The agents arrested both men and seized the bag, which subsequent examination proved contained heroin. Shortly thereafter the agents arrested Copeman as he emerged from an elevator carrying the plaid suitcase. The agents seized the suitcase and found the remainder of the heroin in it.

The defense presented no evidence.

2. The allegedly newly discovered evidence consisted of an affidavit made by Copeman in January 1968, 16 months before the return of the indictment, in which he stated that he had never seen petitioner in apartment 3G until petitioner was brought there by the agents, and that he had never seen petitioner in possession of, heard him discuss, or had a conversation with him concerning, narcotics (Pet. 3). The affidavit was given by Copeman to an assistant of Irwin Klein, the

attorney then representing petitioner, at a New York jail where Copeman was confined on an unrelated matter. Klein, who also represented Copeman at the time, had sent his assistant to the jail to try to secure such an affidavit after petitioner had assertedly told Klein that he had not been involved in the narcotics transactions and that the persons who were involved would so attest. Similar affidavits, exonerating petitioner, were secured by Klein at about the same time from the other persons charged in the narcotics matter (including Hunter, who also was in jail), all of whom were also then represented by Klein (R. 1, affidavit of Klein, p. 2).

Shortly after the return of the indictment (May 14, 1969), petitioner discharged Klein and retained a new lawyer, Howard Diller, to represent him.[3] Diller thereafter continued to represent petitioner until after the trial, which occurred in March 1970. In an affidavit accompanying petitioner's motion for a new trial, Klein asserted that he told Diller, following Klein's discharge, that he was willing to cooperate with Diller and go over his files in the case with him. Klein further stated that he did not in fact discuss the case or go over the files with Diller, since Diller never requested him to. Following his discharge, Klein also suggested to petitioner by letter that petitioner communicate with him regarding the case, but he never heard from

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[3] While the record does not reflect the dates or the circumstances, the other defendants too, evidently, discharged Klein as their counsel before trial. The record in any event shows that Klein did not participate in the trial.

petitioner again until after the trial (R. 1, affidavit of Klein, pp. 1-2; R. 1, affidavit of petitioner, p. 3).

In an affidavit by petitioner, filed in support of the new trial motion, petitioner admitted that Klein had told him that Klein had secured such written statements from the other accused persons, but that petitioner had assumed Klein was referring to those who were at liberty. He did not know that Klein had also secured such statements from Copeman and Hunter, the two accused who were in jail. Petitioner attested that he first learned of Copeman's affidavit at a chance meeting with Klein in the Atlanta Penitentiary in October 1970, seven months after the trial. On that occasion, according to petitioner, he mentioned to Klein that he had been tried and convicted and that Copeman had been a witness against him, whereupon Klein advised him of Copeman's affidavit (R. 1, affidavit of petitioner, pp. 4-5).

ARGUMENT

Petitioner's contention that he was entitled to a new trial is not well founded. To be entitled to a new trial on the ground of newly discovered evidence, a defendant must show that the failure to produce the evidence at trial was not due to lack of diligence on the part of the defendant, that the new evidence is not merely cumulative or impeaching, and that it is of such quality that the probable result of a new trial would be acquittal. *King* v. *United States,* 402 F. 2d 289, 292 (C.A. 10); *Wright* v. *United States,* 353 F. 2d 362, 365 (C.A. 9); *Pitts* v. *United States,* 263 F. 2d 808, 810 (C.A. 9), certiorari denied, 360 U.S. 919; *United*

States v. *Costello*, 255 F. 2d 876, 879 (C.A. 2), certiorari denied, 357 U.S. 937; cf. *Mesarosh* v. *United States*, 352 U.S. 1, 9. None of these requirements was met here.

The alleged new evidence, Copeman's pre-trial affidavit, was obtained by petitioner's own attorney pursuant to petitioner's assertion that he was innocent and that the other accused persons would so state. Petitioner admitted in the motion papers that the attorney had advised him that affidavits exonerating him had been secured from those others, but claimed he had not realized, because Copeman was in jail at the time, that Copeman had been one of those approached. Whether or not petitioner's alleged misunderstanding of what the attorney had told him was justified, the fact remains that, as the district court noted, Copeman's affidavit was available to petitioner when he discharged the attorney and substituted a new one and could have been readily obtained by the exercise of minimal diligence. If neither petitioner nor his trial counsel sought out the first attorney's file in the case, containing the affidavit, it was plain negligence on their part, as the court observed, and its alleged post-trial discovery was not a sound reason for granting a new trial. Cf. *United States* v. *Capece*, 287 F. 2d 537, 538 (C.A. 2), certiorari denied, 368 U.S. 847; *United States* v. *Costello*, *supra*, 255 F. 2d at 879-881.

Nor were the other tests mentioned above satisfied. That Copeman's affidavit would at most have supplied a basis for impeaching his credibility as a witness is evident and conceded (Pet. 4). And since, as the district court pointed out, there was evidence apart from

Copeman's testimony which compellingly implicated petitioner in the illegal actions with which he was charged (including his observed transfer to Hunter of the bag containing heroin immediately prior to the arrests), petitioner has not established that the probable result of a retrial would be acquittal.

At all events, the granting or denial of a new trial on the ground of newly discovered evidence is a matter within the sound discretion of the trial court. There is no showing that that discretion was abused here. See *United States* v. *Maddox*, 444 F. 2d 148, 152 (C.A. 2); *United States* v. *Gaither*, 440 F. 2d 262, 264 (C.A. D.C.); *Robinson* v. *United States*, 345 F. 2d 1007, 1011 (C.A. 10), certiorari denied, 382 U.S. 839; *cf. United States* v. *Johnson*, 327 U.S. 106.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

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DECEMBER 1972.

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